Engineered Comfort Systems, Inc. *and* Local 636, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO. Case 7–CA–48348

March 20, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On August 5, 2005, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief to the General Counsel's cross-exceptions. The General Counsel filed cross-exceptions, a supporting brief, a reply brief, and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

This case involves certain unfair labor practices allegedly committed by the Respondent against one of its employees, Russell Gallette. The judge found that the Respondent's president, Ronald Rodorigo, violated Section 8(a)(1) by telling Gallette, "I can't believe you're going union; you want to bring the whole fucking world down with you." The judge further found that the Respondent violated Section 8(a)(3) by discharging Gallette because of his union activity. The judge dismissed allegations that the Respondent additionally violated Section 8(a)(3), prior to discharging Gallette, by transferring Gallette from service to installation work, changing his start time, and withdrawing his vehicle and cell phone privileges. For the reasons stated by the judge, we agree with the judge's dismissal of the predischarge 8(a)(3) allegations. For the reasons explained below in section 1, we also agree with the judge's finding that Rodorigo's above-quoted statement to Gallette violated Section 8(a)(1). However, we do not agree with the judge's finding that the Respondent, in discharging Gallette, violated Section 8(a)(3). We accordingly reverse that finding for the reasons set out in section 2 below.

1. The Respondent's sole exception to the judge's 8(a)(1) finding states: "Respondent excepts to the ALJ's *credibility* findings crediting the testimony of Russell Gallette regarding a statement by Ronald Rodorigo that 'I can't believe you're going union; you want to bring the whole fucking world down with you.'" (Emphasis added.) Thus, the exception is limited to the judge's *factual* determination that Respondent's agent, Ronald Rodorigo, made the statement at issue. We find no basis in the record for overturning the judge's credibility-based factual determination. See footnote 1, supra. In its supporting brief, however, the Respondent seeks to place the *legality* of the statement at issue by arguing that even if the statement was made, it did not violate Section 8(a)(1). The General Counsel contends that this legal argument should be disregarded under Section 102.46 of the Board's Rules and Regulations. We agree with the General Counsel.

Section 102.46(b)(1) requires, among other things, that each exception "set forth specifically the questions of procedure, fact, law, or policy to which exception is taken[.]" If a supporting brief is filed, it should present "argument . . . in support of the exceptions[.]" Id. In addition, Section 102.46(c) provides that "[a]ny brief in support of exceptions shall contain no matter not included within the scope of the exceptions[.]" Here, the Respondent's single exception to the judge's 8(a)(1) finding is limited to a question of fact, while the Respondent's supporting brief attempts to raise a question of law. Thus, the Respondent has failed to comply with the Board's Rules by arguing a legal issue in its brief that is "not included within the scope of the exceptions." Accordingly, that legal issue is not before us for review. However, even if it were, we would adhere to the judge's conclusion that Rodorigo's statement violated Section 8(a)(1). See *Greyston Bakery*, 327 NLRB 433, 446 (1999) (finding that employer violated Section 8(a)(1) by telling prounion employee that employer had no reason to help her because she was always involved in something negative and was trying to bring the bakery down); *Hialeah Hospital*, 343 NLRB 391 (2004) (finding that employer violated Section 8(a)(1) by telling employees that he felt "betrayed" and "stabbed in the back" because they had contacted the union).[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's recommended Order and substituted a new notice to conform to the violation found here.

[3] In finding Rodorigo's statement unlawful, however, we do not rely, as did the judge, on *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000), enfd. 282 F.3d 972 (7th Cir. 2002). Contrary to the judge's assertion, the Board in that decision did not find that the employer's description of union supporters as "chicken shits" violated Sec. 8(a)(1).

2. The judge found that the Respondent discharged Gallette because of his union activity, in violation of Section 8(a)(3). For the reasons set forth below, we disagree with the judge and shall dismiss this complaint allegation.

The circumstances surrounding Gallette's discharge are more fully elaborated in the judge's decision, but the essential facts are as follows. On Friday, February 11, 2005,[4] Company President Rodorigo instructed Gallette, a known union supporter, to report to the Respondent's Sears Roseville project[5] on the following Monday (February 14) at 7:30 a.m. Over the intervening weekend, without any prior discussion or notice to the Respondent, and without securing the Respondent's approval, Gallette decided that he would take the next week off as a vacation. He left Rodorigo a voice-mail message indicating his intent to do so, but did not return the Respondent's subsequent telephone calls regarding the matter. Gallette did not show up for work as instructed on Monday, February 14. On Tuesday, February 15, after Gallette again failed to call in or report to work, the Respondent discharged him.

We have held that "[t]o prove a violation of Section 8(a)(3) and (1) under our decision in *Wright Line*,[6] the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse action." *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). If the General Counsel sustains this burden, the burden then shifts to the employer to prove, by a preponderance of the evidence, that the same action would have been taken even in the absence of the employee's protected activity. Id.

The judge found that the General Counsel established his initial *Wright Line* case. The judge further found that the Respondent failed to rebut that case because, in the judge's view, the Respondent's discharge of Gallette purportedly for his attendance infraction was inconsistent with its lenient treatment of similar infractions by other employees. Here, the judge took into account the Respondent's reaction to everything from tardiness to consecutive unexcused absences. Noting several instances in which an employee's tardiness or 1-day absence went unpunished, the judge concluded that the Respondent had failed to show that it would have discharged Gallette for his attendance infractions even in the absence of his protected activity.

The Respondent excepts on the grounds that the General Counsel has not met his *Wright Line* burden of proving unlawful motivation and that, in any event, the Respondent has met its burden in rebuttal. Assuming without deciding that the General Counsel has met his initial burden under *Wright Line*, we find, in agreement with the Respondent, and contrary to the judge, that the Respondent has successfully rebutted the General Counsel's case by showing that it would have discharged Gallette even in the absence of his protected activity. Specifically, we agree with the Respondent that the judge improperly based her 8(a)(3) finding on the Respondent's treatment of employees who were not similarly situated to Gallette.

Although the evidence supports the judge's finding that the Respondent did not always discipline employees for lesser attendance infractions such as tardiness or single-day absences, this evidence is of limited probative value. Gallette did not simply arrive late to work or fail to show up for work on a single day; he failed to call in or show up for work on 2 consecutive days. Only two other employees of the Respondent fell, like Gallette, in this 2-day no-call/no-show category: John Koss and Terry Rodorigo. Koss was terminated after failing to call in or report to work on November 11 and 12, 2003. Terry Rodorigo was terminated after failing to call in or report to work on May 9 and 10, 2005.[7] Based on the Respondent's prior discharge of Koss, we find that the Respondent sustained its *Wright Line* burden of showing that it similarly discharged Gallette for being a 2-day no-call/no-show and that it would have done so regardless of his protected activity. The Respondent's subsequent discharge of Terry Rodorigo for the same infraction was consistent with the Respondent's discharges of Gallette and Koss. The General Counsel failed to present significant countervailing evidence of disparate treatment of similarly situated employees, i.e., employees who went 2 days as "no-call, no-shows" and were not discharged. For these reasons, we reverse the judge's finding that the Respondent unlawfully discharged Gallette because of his union activity.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Engineered Comfort Systems, Inc., Dearborn Heights, Michigan, its officers, agents, successors, and assigns, shall

[4] All dates hereafter are in 2005.

[5] In her decision, the judge incorrectly refers to the Respondent's Sears "Roseville" project as the Sears "Rossville" project.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[7] Terry Rodorigo was terminated on May 10, a little over 2 weeks after the General Counsel issued the complaint in this case.

[8] In agreeing with his colleagues that the Respondent met its *Wright Line* burden, Member Walsh does not rely on the Respondent's post-complaint discharge of Rodorigo.

1. Cease and desist from

(a) Threatening employees with adverse employment consequences because of their activities on behalf of Local 636, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Dearborn Heights, Michigan facility, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 2005.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with adverse employment consequences because of their activities on behalf of Local 636, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

ENGINEERED COMFORT SYSTEMS, INC.

Darlene Haas Awada, Esq., for the General Counsel.
David B. Gunsberg, Esq., for the Respondent.
Joseph G. Andrews, for the Union.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Detroit, Michigan, on May 25 and 26, 2005. The original charge in Case 7–CA–48348 was filed by Local 636, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (the Union) on February 16, 2005,[1] and amended on February 23, 2005. Based upon the allegations contained in the amended charge, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on April 22, 2005. The complaint alleges that Engineered Comfort Systems, Inc. (Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employee Russell Gallette (Gallette) with disciplinary action or adverse employment consequences if he engaged in activity on behalf of the Union. The complaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by engaging in certain conduct toward Russell Gallette. Specifically, the complaint alleges that on or about February 11, 2005, Respondent transferred Gallette from service work to installation work, eliminated Gallette's use of a Respondent-provided cellular phone and vehicle, and changed Gallette's starting time from 8:30 to 7:30 a.m. The complaint also alleges that Respondent unlawfully terminated Gallette's employment on February 15, 2005. Respondent filed a timely answer to the complaint denying the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are 2005, unless otherwise indicated.

by counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Dearborn Heights, Michigan, is engaged in the installation and service of heating, air-conditioning, and refrigeration systems. Annually, Respondent derives gross revenues in excess of $500,000 and purchases products valued in excess of $50,000 from points located outside the State of Michigan. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Prior to approximately 2000, Ronald Allen Rodorigo (Rodorigo), and John Jones were partners in a business known as Quality Temperature Controls Inc. Union Business Agent Gregory Sievert testified that Rodorigo and John Jones were the first signatory contractors to sign a prehire agreement with him as a union business agent. When the partnership dissolved, Rodorigo became the sole owner of Engineered Comfort Systems, Inc. For the past 5 years, Respondent has not been a signatory contractor with the Union. Rodorigo testified, without contradiction, that he has been involved in negotiations for the past 8 months with the Operating Engineers Union Local No. 547. Rodorigo also periodically employs Kenny Devanzo, who is a member of the Iron Workers Union. Rodorigo pays Devanzo the same fringe benefits as other employees and does not pay the Iron Workers' fringe benefits.

Michelle Ragland has been employed by Respondent for 4 years and has worked as Respondent's office manager since early 2002. Ragland also handles all of the human resources functions for Respondent and has the authority to discipline and direct employees in their work. Terri Lynn Rodorigo is the former sister-in-law of Ronald Rodorigo and has been employed by Respondent for approximately 2 years. While she served as dispatcher in 2004 and part of 2005, she is currently classified as office assistant. William Vaillancourt was hired by Respondent as a project manager at the end of January 2005. Respondent stipulated that prior to February 14, 2005, Vaillancourt was a supervisor within the meaning of Section 2(11) of the Act. Vaillancourt testified that he left his supervisory position on February 14, because Rodorigo told him that he was needed in the field. Vaillancourt received a salary prior to February 14, and he continues to be paid by salary.

Other than Vaillancourt, Devanzo, and the office employees, all employees have company-provided vehicles. All field employees, with the exception of Jeffrey Macko and Devanzo, have company-provided cellular phones. Devanzo and Macko use their own personal cellular phones.

Russell Gallette was employed by Respondent as a service and controls technician from 1999 until February 15, 2005. In September 2004, Gallette moved to a new residence that was located approximately 40 miles from Respondent's Dearborn Heights facility. Gallette testified that while the usual working hours were 8 a.m. to 4:30 p.m. for most employees, he had been allowed to work from 8:30 a.m. to 5 p.m. after he moved his residence. The change in working hours allowed him to take his son to school in the mornings.

B. Events Occurring During the Week of February 7, 2005

There is no dispute that Rodorigo held a meeting with employees concerning attendance and tardiness on February 7. Employees were required to sign a statement confirming their attendance at the meeting and confirming their understanding of the purpose of the meeting. The statement further stated that the meeting "was held as a direct result of excessive unexcused absenteeism and tardiness within the company." Rodorigo testified that employees' tardiness and attendance problems had resulted in not only customer complaints, but also in loss of time and money. Gallette acknowledged that prior to the attendance meeting, there had been absenteeism and lateness. He also admitted that prior to the meeting, there were occasions when he was late and missed time on the job.

In early February 2005, Office Manager Ragland notified employees that their employee health insurance had changed from PPO coverage to HMO coverage. On February 8, Gallette received a telephone call from his wife concerning her difficulty in getting a prescription filled under the new insurance coverage. In response to his wife's call, he telephoned Ragland and explained that his wife could not get her prescription filled and could not find a physician under the new insurance coverage. Ragland suggested that Gallette's wife telephone her and Ragland also assured him that she would look into the matter. Gallette also left a voice-mail message for Rodorigo to call him.

While both Gallette and Rodorigo confirm that Gallette left a voice-mail message informing Rodorigo of his wife's reported problems using the new insurance coverage, their accounts of their later conversation and the voice-mail message are widely divergent. Gallette testified that when he spoke with Rodorigo, he told him that the new insurance was "junk" and that his wife had been forced to change physicians. Gallette recalled that Rodorigo told him: "The cunt needs to get off her lazy ass and find a doctor." On cross-examination, Gallette admitted that when he gave his affidavit to the Board agent during the Region's investigation of the charge, he had not included the allegation that Rodorigo made such a statement about his wife. He testified that he had simply remembered it on his way to the hearing. Gallette also testified that in prior discussions with Rodorigo about the insurance, Rodorigo mentioned that he didn't want employees to be charged a $200 monthly copayment; however, he had heard that the union plan required such a copayment. Gallette testified that during this telephone conversation, he told Rodorigo that he had checked with the Union and that the union plan did not require this kind of copayment. Gallette maintained that Rodorigo responded by asking why he didn't "go get a union job?"

In contrast to Gallette's testimony, Rodorigo recalled that in his voice-mail message, Gallette asked: "What the fuck kind of junk-fucking insurance do you have?" Rodorigo also testified that Gallette used a racial slur and described the insurance as

"junk-fucking ghetto insurance." Rodorigo recalled that he was conducting a walk-through inspection on a jobsite in Knoxville, Tennessee, when he listened to Gallette's voice-mail message. He described Gallette's message as graphic and desperate as he explained that his wife could not get her prescription filled and his concerns that she might die. Rodorigo testified that in response to Gallette's voice-mail message, he contacted Ragland and asked her to get in touch with their insurance representative. He instructed Ragland to make sure that Gallette received information on how to use the new insurance. Rodorigo also recalled that he later telephoned Gallette when he returned to Detroit. He acknowledged that there was some discussion about whether the union insurance coverage required a copayment. Rodorigo recalled that in a prior conversation he had told Gallette about his brother-in-law paying $200 a month on a deductible for union insurance. Rodorigo testified that during his conversation with Gallette on February 10, Gallette told him that there was not a $200 copayment with the Union. Rodorigo understood Gallette's statement as follow up their earlier conversation. During his testimony, Rodorigo did not address the alleged statement about Gallette's getting a union job.

After his telephone conversation with Rodorigo, Gallette telephoned Union Business Agent Gregory Sievert and Union Organizer Joe Andrews. He was unable to reach them and left messages for each of them. Gallette testified that after he returned home on February 8, he telephoned fellow employee Khalid Maziad Kanaan. Gallette testified that during his conversation, he talked with Kanaan about the change in insurance and also told him that he was getting the Union involved in organizing Respondent's facility. Kanaan recalled that he spoke with Gallette about the new insurance prior to February 11. He also recalled that at some point in time during the month of February, Gallette spoke with him about the Union. He could not, however, recall that Gallette approached him about organizing Respondent's facility prior to February 11.

1. February 9 and 10

Employees begin their workday at either Respondent's facility or on their respective jobsites. If employees need to pick up supplies for their day's work, their workday may also begin when they arrive at a supply house. There is no dispute that on February 9, Gallette was 30 minutes late in arriving at Young's Supply. Ragland testified that Gallette telephoned her at approximately 9 a.m. When she asked why he was late, he told her that he had been delayed by a snow storm. Gallette testified that he had not telephoned Ragland earlier because he had experienced problems with his cellular phone. Ragland testified that after speaking with Gallette, she decided to discipline him for his absence. She prepared a disciplinary warning for tardiness for both Gallette and also for employee Jason Witek on February 9.

Gallette recalled that later in the day, he spoke with Union Organizer Andrews and inquired about the Union's organizing Respondent's employees. They discussed strategies of organizing and the number of employees who would be involved. They tentatively agreed to a meeting on Friday, February 11. Later in the day, Gallette also spoke with Union Business Agent Sievert and confirmed the scheduled meeting for February 11.

Gallette testified that he also telephoned employee Jeff Macko on February 10, and talked with him about the new insurance. Gallette testified that he told Macko that he had already spoken with Kanaan and that he had contacted the Union about organizing the facility. Gallette also recalled that he told Macko about the meeting with the Union that was set for February 11.[2] Gallette testified that Macko responded: "Don't leave me out on this Rus." While Macko testified under subpoena by counsel for the General Counsel, he maintained that he did not recall when Gallette spoke with him concerning union organizing. He did, however, acknowledge that he had signed a questionnaire confirming that he had spoken with Gallette about organizing prior to February 11. The questionnaire, received into evidence as General Counsel's Exhibit 62, purports to contain the signatures of eight individuals. The heading is phrased: "To the best of your knowledge, did Russ Gallette ever talk to you about organizing Engineered Comfort Systems with any union before February 11, 2005? Seven of the individuals indicated "No" and only Macko indicated "Yes." While Macko acknowledged that he signed the document, he could not recall when he did so and who provided the document to him for his completion and signature. The record contains no other evidence of the creator of the document or the timeframe in which it was completed. Macko was not asked and did not otherwise confirm that Gallette told him about a scheduled meeting with the Union on February 11.

Ragland informed Gallette by telephone on February 10, that he was to report to the office at the beginning of his workday on February 11. While Ragland told him that he needed to come in to sign some "papers," she did not tell him that he was going to receive discipline for his tardiness on February 9. Ragland testified that when Gallette telephoned her at approximately 6 p.m. on Thursday, he again inquired what papers he was to sign when he reported to the office on February 11. She recalled that she told him that it was "no big deal" but related to his being late for work on Wednesday morning.[3] When Gallette spoke with Rodorigo by telephone during the day on February 10, Rodorigo only confirmed that he needed to sign papers and he did not disclose that Gallette was to be disciplined.

2. February 11

Gallette's recall of the events on February 11 differs from the recall of Ragland and William Vaillancourt. It is undisputed that Gallette arrived at the office at approximately 8:30 a.m. Gallette recalled that when he arrived in the parking lot, he met truckdriver Bill Cox. Cox told him that he had been instructed to empty Gallette's van of all company tools and materials. Gallette maintained that when he went into the office, only Ragland, Vaillancourt, and dispatcher Terri Lynn Rodorigo were present in the office. Ron Rodorigo was not

[2] While Gallette testified that he also talked with employees Ken Devanzo and Terry Rodorigo about his interest in the union organizing, neither employee testified to confirm or rebut his testimony.

[3] Ragland also recalled that Gallette inquired as to whether his coming in had anything to do with "that fat fuck" who sits between her and Rodorigo.

present at the facility. Gallette asked Ragland why Cox was emptying his van. Gallette recalled that Ragland told him that he would not need the van anymore because he was now a "construction worker." It is undisputed that Ragland gave Gallette two documents to sign. One document was a form acknowledging that he attended the February 7 meeting on attendance and the second document was his warning. Gallette testified that he told Ragland that he was not signing the warning and that he was "on his way home." Ragland recalled that Gallette informed her that he was going home to Monroe and that was where she could later pick up the van.

William Vaillancourt recalled that he had been sitting at his desk when he heard Ragland conducting a disciplinary interview with Gallette. He overheard Gallette cursing and also his telling Ragland that Rodorigo would have to pick up his van. When Gallette left the office, Vaillancourt followed him out of the building. Vaillancourt told Gallette that if he were quitting, he could not take the van. Vaillancourt recalled that Gallette got into the van and began to drive erratically in the parking lot. Vaillancourt also told Gallette that if he took the van, he would have to contact the police and report the van stolen. Gallette acknowledged that after talking with Vaillancourt, he returned to the office. Vaillancourt recalled that before returning to the office, Gallette told him that he was a "kiss-ass" to Rodorigo. When Gallette returned to the office, he told Ragland that he would go to work and asked her where he was to report to work. She told him that he was to report to the Sears Roseville project. She explained that before leaving, however, he had to sign the form acknowledging the meeting on February 7. Gallette signed the acknowledgement form but did not sign the warning. He also testified that at the time that he left the office, no tools had been removed from his van. Vaillancourt testified that while Ragland directed him to report to work at the Sears Roseville project, she did not at any time tell him that he was a "construction worker." Vaillancourt, Rodorigo, and Ragland all testified that Respondent did not employ anyone in the classification of construction worker.

3. Gallette's meeting with the Union

After leaving the office, Gallette telephoned Andrews and Sievert and asked where they wanted to meet him. Agreeing to meet at a restaurant known as Kirby's, Gallette arrived at the restaurant at approximately 9:30 a.m. Andrews was waiting for him and Sievert arrived shortly thereafter. Sievert gave Gallette union materials and also union authorization cards. Gallette signed an authorization card at that time. When Gallette left the restaurant to go to the worksite, Andrews and Sievert followed him.

Vaillancourt testified that after Gallette's visit to the office, he attempted to reach Rodorigo by telephone. He left a telephone message on Rodorigo's cellular phone and recounted the incident with Gallette in the parking lot. After Gallette left the office, Vaillancourt also left the office for the Sears Roseville worksite. He estimated that it took him approximately 40 minutes to drive to the worksite. When Vaillancourt arrived at the site, Gallette was not there. While Vaillancourt remained at the site for another 20 to 30 minutes, Gallette had not reported to the worksite. Rodorigo spoke with Vaillancourt and discovered that Gallette had not reported to work at the Sears Roseville site. At the time of the conversation, Rodorigo was in his vehicle and driving approximately 5 miles north of the Sears Roseville worksite. When Rodorigo was unable to reach Gallette by cellular phone, he left a message telling Gallette that he was "MIA" and that if he did not call immediately, Rodorigo would report the van stolen. Within a few minutes, Gallette returned the call and reported that he was just driving into the Sears Roseville parking lot. Rodorigo told him that he was not to enter the property and that he should return to the office. Gallette acknowledged that Rodorigo called him and directed him to return to the office. Before returning to the office, Gallette spoke with Andrews and Sievert, reporting that Rodorigo ordered him to return to the office. Gallette also maintained that before leaving for the office, he stopped to talk with employees Macko and Devanzo. He asserted that he told them that he was "getting the company organized" and that while he asked Macko to sign a union card, Macko declined. Although Macko testified, he did not confirm that Gallette solicited him to sign a union card on February 11.[4] Andrews testified that he and Sievert talked with Devanzo and Macko. Although Andrews recalled that Gallette was present on the jobsite, he did not testify that Gallette or anyone else solicited either employee to sign a union card during the February 11 conversation.

Rodorigo explained that as he drove back to the office to meet with Gallette, he decided that he was going to take away Gallette's cellular phone and his company van until Gallette demonstrated a better "work environment." When Gallette arrived at the office, Ragland, dispatcher Terri Lynn Rodorigo, and Vaillancourt were present in the office as well as Rodorigo. At the beginning of the meeting, Rodorigo asked Ragland and Terri Lynn Rodorigo to leave the office.

Rodorigo, Gallette, and Vaillancourt all describe the initial portion of the meeting in much the same way. Rodorigo began his meeting with Gallette by asking where Gallette had been since leaving the office. Gallette responded that he stopped for breakfast. Gallette acknowledged that when Rodorigo asked about his disappearance for 2 hours, he did not tell Rodorigo with whom he had been meeting. Vaillancourt recalled that Rodorigo pointed out that Gallette had been on the clock and asked how he (Rodorigo) could charge customers for Gallette's sitting in a restaurant eating breakfast. When Gallette stated that the restaurant had been on his way to the jobsite, Rodorigo disputed his claim. Rodorigo recalled that he talked with Gallette about various concerns including complaints by one of the customers and about the racial slur that he had made earlier in the week. Vaillancourt recalled that Rodorigo told Gallette that there had been complaints from customers and that the cus-

[4] Macko testified that after Gallette's discharge, Rodorigo asked him to prepare a statement concerning his work with Gallette. The statement dated March 25, 2005, includes the following: "I, Jeff Macko, employed by Engineered Comfort Systems had the experience of working with Russ Gallette on a couple of occasions helping with control wiring. As it got to the point of Russ leaving E.C.S. there was a discussion of possibly joining the union 636 pipe fitters and I told him I was not interested. Then a phone call was made to me that went to my voice mail again regarding the union when I never returned his phone call that was the last time I heard from Russ."

tomer on his previous worksite did not want him to return. Vaillancourt recalled that Rodorigo questioned Gallette about his use of racial slurs with respect to employee Kanaan's family and about his calling Vaillancourt a "fat ass." Gallette recalled that Rodorigo told him that he did not like his attitude and accused Gallette of not showing up for work, degrading women, and making racial slurs. Gallette recalled that Rodorigo told him that the customer who had complained had requested a meeting with Gallette. Gallette also testified that after Rodorigo accused him of degrading women, making racial slurs, and not showing up to the job on time, he accused Rodorigo of changing to cheaper insurance in order to pay Vaillancourt a higher salary.

There is no dispute that during the course of the meeting, Rodorigo informed Gallette that he was taking away Gallette's use of the company cellular phone and vehicle. The testimony varies, however, as to the point in time when Rodorigo asked for both the cellular phone and the vehicle. Rodorigo testified that early in the conversation he told Gallette: "Give me your cellular phone." Rodorigo recalled that he then told Gallette that he was to turn in his truck and provide his own transportation. Rodorigo also testified that he explained to Gallette that he (Rodorigo) was going to clean and provide maintenance on the truck. Rodorigo told Gallette that once he could demonstrate that he could show up for work consistently, the van would be returned. Gallette questioned how he was going to be able to get to and from work without the van. Vaillancourt recalled that Rodorigo told Gallette that he could drive his personal vehicle to the worksite. He added that if Gallette did not have transportation, he could come to the office and ride to the worksite with another technician.

Rodorigo recalled that after he told Gallette that he was to turn over his cellular phone and the company van, Gallette made the statement that it sounded as though Rodorigo was firing him. Rodorigo recalled that he told Gallette, "No, I'm just calling you out." Rodorigo testified that while Gallette did not say anything in response, he reached into his pockets and pulled out some cards and threw them on the desk. Both Vaillancourt and Rodorigo acknowledged that Gallette produced the cards and explained his intentions to organize the employees. Rodorigo recalled that Gallette also announced that he was a "salt." When Rodorigo asked what that meant, Gallette told him that he believed it meant that he was a union organizer. Rodorigo told Gallette that he couldn't talk with him about labor issues and they needed to stick to the subject at hand.

Gallette's testimony with respect to the production of the authorization cards varies regarding the timing of the production. Gallette testified that after Rodorigo took away his cellular phone, he decided that it was "time to get everything out in the open." He recalled that it was at that point, that he pulled the union authorization cards from his pocket. Gallette testified that Rodorigo did not respond to his production of the cards or his pronouncement that he was going to get everyone to sign the cards. Gallette testified that Rodorigo only stated that Gallette also needed to turn in the keys to his van. Gallette asserted that Rodorigo explained that "construction workers" did not need the use of the van and they had to provide their own transportation.

Gallette recalled that Rodorigo suggested that they go outside and clean out the truck. Rodorigo told Gallette that after the tools were removed from the truck, Cox would drive him home. Gallette acknowledged that two unopened beer cans were found when the van was unloaded. He asserted that neither Vaillancourt nor Rodorigo said anything when they saw the beer cans. Gallette also acknowledged that Rodorigo told him that he was going to have the truck serviced and that perhaps the truck would be returned to him in a few days. Gallette testified that he told Rodorigo: "I've got all my tools on this truck, you're driving me home, it's 1:00 in the afternoon, you know. As far as I'm concerned, you know I'm fired." He also recalled that despite his assertion that he was fired, Rodorigo told him that he was to report to work on the following Monday at 7:30 a.m. at the Sears Roseville jobsite to work on the installation of a chiller.

4. Gallette's vacation

Gallette testified that on either Saturday or Sunday, he called Rodorigo and left the message that he had decided to take his remaining week of vacation during the week of February 14. After receiving Gallette's message, Rodorigo telephoned Ragland and questioned her about authorizing Gallette's vacation. She assured Rodorigo that she had not authorized Gallette to take the next week as vacation. During the weekend, she telephoned Gallette's home and left a message with his son[5] for Gallette to call her. There is no dispute that Gallette did not report to work on February 14, and did not return Ragland's telephone call.

Ragland testified that company policy requires an employee to give a 2-week notice before taking vacations in non-emergency situations. Both Rodorigo and Ragland confirmed that employees cannot schedule themselves for vacation without authorization. While Gallette testified that he has previously been allowed to take vacation days without giving a 2-week notice, there is no record evidence that employees have scheduled themselves for vacation without prior authorization. Gallette does not dispute that he began his vacation without speaking with either Rodorigo or Ragland. When Gallette went into the office on February 15 to pick up his paycheck, Ragland told him that he had not been authorized to take leave. Admittedly, when Gallette told Ragland that he would call her again on Friday to find out where he was to report to work the following week, she again told him that he was not on vacation. Gallette testified that when he telephoned Ragland on Friday and inquired where he was to work the next week, she again told him that he was not on vacation and that he had been released on the previous Tuesday.

Ragland testified that when Gallette did not show up to work at 7:30 a.m. on February 15, she decided to terminate him. When he came into the office toward the end of the workday, she presented him with his termination notice. She recalled that he reviewed the document and refused to sign it. She asked him to turn over the keys to his previous work project. He told her that he had done so when he turned in the keys to the van. She reminded him that all petty cash had to be turned in before

[5] Gallette testified that his children are 15 and 16 years old.

his last check or the amount would be deducted from the last check.

Andrews testified that Gallette telephoned him over the weekend prior to February 14, and they discussed setting up meetings with employees during the following week. On February 14, Andrews prepared a letter to Rodorigo. The letter informed Rodorigo that the Union was actively engaged in organizing Respondent's employees. The letter also stated that Gallette wished to be identified as an employee who was currently engaged in the organization activity. The certified mail record indicates that the letter was delivered to Respondent's office on February 15. A United States Postal Service tracking record confirmed that the letter was delivered at 10:30 a.m. on February 15.

Gallette testified without contradiction that he did not arrive at Respondent's facility on February 15 prior to approximately 3 or 4 p.m. While Terri Lynn Rodorigo testified, she did not testify what happened to Andrews' letter after she signed for it on February 15. Ragland neither admitted nor denied that she read the Andrews' letter prior to preparing Gallette's notice of termination.

5. The alleged e-mail

On February 16, the Union filed a charge with the Board, alleging that Respondent discriminated against Gallette by changing his employment status from service technician to construction worker on February 11. On February 23, the charge was amended to include the allegation that Gallette was unlawfully terminated on February 15. During the course of the Board's investigation, Gallette forwarded to the Board a copy of an e-mail that had allegedly been sent to him by Rodorigo. The e-mail was sent from Rodorigo's AOL (America Online) address to Gallette's AOL address. The message included: "Russ, please quit sending us union info. We told you time after time we would never do that. The guys are happy the way things are. They happen to like there [sic] jobs and will not do anything to jeopardize like you did. The crew @ ECS."

During his direct testimony, Rodorigo was not asked if he had sent the e-mail to Gallette as alleged. Office Assistant Terri Lynn Rodorigo explained that a part of her job is to prepare and type all e-mails for Rodorigo. She testified that he dictates all of his e-mails to her and she prepares the e-mails. She testified that she reviewed all the e-mails on Rodorigo's system dealing with mail to Gallette in 2005. She denied that she had ever seen the e-mail purported to have been sent by Rodorigo on March 7.

III. FACTUAL AND LEGAL CONCLUSIONS

A. Alleged 8(a)(1) Violations

Complaint paragraph 7 alleges that on or about February 11, 2005, Respondent, by its agent Ronald Rodorigo, at its Dearborn Heights facility, threatened employee Russell Gallette with disciplinary action or adverse employment consequences if he engaged in activity on behalf of the Charging Union. There is no dispute that during the disciplinary interview on February 11, Gallette displayed union authorization cards and announced that he was a union organizer. He testified that during the time that the tools were unloaded from the van, Rodorigo stated: "I can't believe you're going union; you want to bring the whole fucking world down with you." Gallette testified that he responded: "Well, you know, that's what I'm doing Ron, so you know; I guess we'll just find out later on exactly what happens." While Rodorigo testified concerning the February 11 meeting, he did not specifically deny the alleged statement to Gallette. He testified that when Gallette brought up the Union during the meeting, he responded by stating that he could not talk with Gallette about union issues. Vaillancourt testified that Rodorigo said that Gallette "had to do what he had to do" and that he (Rodorigo) was not going to discuss union issues.

Counsel for the General Counsel argues that the presence of contemporaneous unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks.[6] Citing *SKD Jonesville Division*, 340 NLRB 101, 102 (2003), counsel for the General Counsel argues that the Board has found similar nonspecific threats to violate Section 8(a)(1) of the Act. In the case cited by counsel for the General Counsel, a supervisor accused an employee of planning to organize a union and the employee denied that she was planning to do so. After stating that he would fire all of the employees on workmen's compensation if he could do so, he told the employee that it was not in her best interest to get involved with the union. Unlike the employee in *SKD Jonesville Division*, Gallette asserts that he brought up his involvement in union organizing. Additionally, unlike the supervisor in *SKD Jonesville Division*, Rodorigo's alleged threat does not accompany any other threat of retaliation toward employees.

In his brief, counsel for Respondent addresses the alleged 8(a)(1) violation by asserting that Gallette was a totally incredible witness whose testimony in this respect should be completely disregarded. In part, I agree and I do not find Gallette's overall testimony to be credible. As counsel for Respondent points out in his brief, Gallette testified that he considered himself to be terminated on February 11, and yet he scheduled himself for a vacation for the week of February 14. As I have noted above, Gallette alleged in his trial testimony that Rodorigo referred to his wife in extremely derogatory terms during the February 8 telephone conversation. Admittedly, however, he failed to include such testimony in his investigative affidavit to the Board and contended that he had suddenly remembered it on the way to the trial. He also testified that when he went into the office to pick up his check on February 15, Ragland did not inform him that he was terminated. He asserts that he did not find out that he was terminated until he called in again later in the week to get his work assignment for the following week. I find this testimony difficult to believe. Based upon Gallette's account, when Ragland told him that he was not authorized to be on vacation, he argued that he was and walked out. His contention that he casually telephoned her 3 days later to receive his next work assignment appears improbable.

One of the more troubling aspects of Gallette's credibility is the alleged e-mail of March 7, 2005. Gallette testified that following his discharge on February 15, he received an e-mail from Rodorigo's e-mail address. As described above, the e-

[6] *Coach & Equipment Sales Corp*., 228 NLRB 440, 441 (1977).

mail is purportedly from "The crew @ ECS" and urges Gallette to stop sending union information. The e-mail also includes the statement: "The guys are happy the way things are. They happen to like there [sic] jobs and will not do anything to jeopardize like you did." Office assistant Terri Lynn Rodorigo testified that she prepares and sends all of Rodorigo's e-mails. She explained that Rodorigo does not personally send any e-mails. She credibly testified that she had reviewed all of the e-mails received and sent to Gallette during 2005, and the alleged March 7 e-mail message was not among them. She testified that on more than one occasion, she had given Gallette the password that accessed Rodorigo's AOL e-mail account. She had done so because Gallette had a laptop computer and needed to access information while on the job. While Gallette was present throughout the entire proceeding, he did not rebut Terri Lynn Rodorigo's testimony. In contrast to Gallette's testimony, I found Terri Lynn Rodorigo to be a very credible witness. It is not plausible that Rodorigo would send such a blatantly incriminating e-mail after the filing of the underlying charge in this matter. Such an action appears not only inconsistent with good business judgment, but also devoid of a modicum of common sense. While Gallette may have produced the e-mail to enhance the argument of Respondent's animus, the e-mail actually raises additional credibility concerns with respect to Gallette's testimony.

The alleged threat, however, was unrebutted. Rodorigo's alleged statement that Gallette was going to bring the whole "fucking world" down with him is certainly a statement that lends itself to a number of interpretations. Despite the range of interpretation, however, such broad and unspecified statements have been found violative of Section 8(a)(1). In *RC Aluminum Industries,* 343 NLRB 939, 941 (2004), a supervisor's asking an employee if he "wanted to continue the war" was found violative. Similarly, a supervisor's description of union supporters as "chicken shits" has been found as a veiled threat of discharge and violative of Section 8(a)(1). See *L.S.F. Transportation, Inc*., 330 NLRB 1054, 1066 (2000).

Although both Vaillancourt and Rodorigo testified, neither witness directly addressed the alleged threat. Accordingly, on the basis of the entire record testimony concerning this alleged violation of Section 8(a)(1), I credit Gallette's unrebutted testimony and I find that Rodorigo's statement was a veiled threat that Gallette's union activity would result in adverse employment consequences.

B. Alleged 8(a)(3) Violations

Counsel for the General Counsel submits that Respondent unlawfully changed Gallette's working conditions on February 11, and then subsequently terminated his employment on February 15 because of his support and activities on behalf of the Union. In determining whether an employer's actions against an employee violates Section 8(a)(3) of the Act, the Board uses the analytical framework set out in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *Wright Line* is based upon the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. Under the Board's decision in *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a substantial and motivating factor in the employer's adverse action. Accordingly, the General Counsel must offer evidence that the employer was aware of the employee's protected activity, and that animus against the protected activity motivated the employer's alleged discrimination. *KFMB Stations*, 343 NLRB 748, 751 (2004). *Farmer Bros. Co*., 303 NLRB 638, 649 (1991), enfd. 988 F.2d 120 (9th Cir. 1993). Once the General Counsel has established that an employee's protected activity is a motivating factor in an employer's decision to take adverse action toward the employee, the burden shifts to the employer to demonstrate that it would have taken the same action in the absence of the protected activity. *Merrillat Industries, Inc*., 307 NLRB 1301, 1303 (1992).

1. February 11, 2005 allegations

Paragraph 8 of the complaint alleges that on or about February 11, Respondent transferred Gallette from service to installation work, eliminated his use of a Respondent-provided vehicle and cellular phone, and changed his starting time from 8:30 to 7:30 a.m.

a. The alleged transfer from service to installation work

Although the complaint alleges that Gallette was unlawfully transferred from service to installation work on February 11, there is no evidence of any permanent change in classification. While Gallette testified that he was told that he no longer needed the van because he was a "construction worker," the record does not reflect the relation, if any, between installation work and the classification of "construction worker." No other witness other than Gallette identified "construction worker" as an existing employee classification. Additionally, Gallette admitted that service technicians perform some installation work in their duties. He also acknowledged that service technicians worked independently of each other and he was unaware of all of the work performed by other service technicians. Service technician Khalid Maziad Kanaan testified that his duties involved troubleshooting and occasional installation work. He explained that he installed large parts or condensing units. He acknowledged that while he was not an "installer," he could work on an "installer crew." Gallette also admitted that Ragland had told him earlier that because of customer complaints, he had been removed from the Samaritan jobsite. It is undisputed that prior to his talking with Rodorigo on February 11, he had already been assigned to work at the Sears Roseville worksite. Additionally, there is no evidence that there was any other work available to which Gallette could be assigned.

b. The alleged change in Gallette's start time

Rodorigo testified that he told Gallette to report to the Sears Roseville job at 7:30 a.m. because Sears wanted Respondent to have a consistent and dedicated crew who would not "pop in and out" as they wanted. While I found Rodorigo's explanation for the necessity for the 7:30 a.m. starting time less persuasive than his explanation with respect to other alleged changes, the overall record does not support a finding of a discriminatory change in starting time for Gallette. Counsel for the General Counsel argues that Rodorigo's explanation for the 7:30 a.m.

starting time is not plausible because Ragland did not send Gallette to the Roseville project until after his scheduled meting with her on February 11 at 8:30 a.m. I do not find this difference in starting time for February 11 and 14 to be significant. Inasmuch as Ragland's normal starting time in the office was 8:30 a.m., it would have been impractical for Gallette to report to the worksite at 7:30 a.m. on February 11, only to leave again to drive the estimated 40 minutes back to the office to meet Ragland at 8:30 a.m. Additionally, I find it significant that Ragland had already assigned Gallette to the Roseville job prior to Gallette's proclamation of his intent to organize Respondent's facility. There is no evidence that the 7:30 a.m. starting time was anything other than part of the requirements for the Roseville job to which Gallette was assigned.

c. The loss in cellular phone and vehicle privileges

There is no dispute that prior to February 11, service and installation employees were given the use of company-provided vehicles and cellular phones. Rodorigo asserts that prior to meeting with Gallette on February 11, he decided to take away Gallette's cellular telephone and company vehicle. He contended that he did so because of Gallette's failure to show up for work and his excessive use of his cellular phone. While both Rodorigo and Ragland asserted that Gallette used his cellular telephone excessively, no documentation was offered in support of his alleged excessive usage as compared to any other employees. With respect to Gallette's failure to show up for work, it is undisputed that he was tardy on February 9. Additionally, Gallette does not deny that he did not immediately report to the Sears Roseville worksite on February 11 as assigned.

Counsel for the General Counsel submits that Rodorigo's elimination of Gallette's use of the company-provided vehicle and cellular telephone resulted from Gallette's union activity. The overall record, however, does not support this finding. Gallette's own testimony indicates that he did not produce the union authorization cards or inform Rodorigo of his intention to organize employees until after he was informed that he was to relinquish his cellular telephone. If Gallette is to be credited, both Cox and Ragland had already informed him earlier in the day on February 11, that his tools were to be removed from his van and that he was going to lose the benefit of the van. While Gallette asserts that he spoke with employees Kanaan, Macko, and Devanzo about organizing for the union prior to his meeting with Rodorigo on February 11, there is minimal corroboration for his doing so. Kanaan testified that he could not recall whether Gallette spoke with him about the Union prior to February 11. While Macko admits that he signed a document confirming that he had spoken with Gallette about the Union prior to February 11, he testified that he could not actually recall having done so.

In assessing whether counsel for the General Counsel has met the requisite burden under *Wright Line*, I find the element of Respondent's knowledge to be a major limitation. Although the record is somewhat unclear as to the extent to which Gallette may have spoken with employees during the week prior to February 11, the more pivotal issue is whether Respondent had any knowledge of his doing so. There is no direct evidence that Rodorigo, Ragland, or even Vaillancourt had any knowledge that Gallette telephoned or met with union representatives prior to Respondent's decision to withhold Gallette's use of the company-provided vehicle and cellular telephone. In an apparent attempt to establish knowledge, Gallette testified that while he met with Andrews and Sievert at the restaurant on February 11, he observed a black Pontiac Grand Am vehicle drive through the parking lot. Rodorigo testified, without contradiction, that he was driving a 2001 Expedition Suburban utility vehicle on February 11. I also note that even if Rodorigo had driven through the parking lot as Gallette implies, there is no basis to conclude that he would have recognized the union representatives' vehicles or would have had any reason to know that Gallette was meeting with union representatives inside the restaurant.

Macko acknowledged that he signed a statement confirming that he spoke with Gallette about the Union prior to February 11; however, he testified that he had no specific recall of having such conversation. Even assuming that Gallette talked with Macko about the Union, there is no evidence that he told Rodorigo or any other management official about the conversation.

Counsel for the General Counsel argues that Respondent's knowledge of Gallette's union activities is demonstrated by Gallette's conversation with Rodorigo about whether union insurance required a $200 copayment. The record evidence does not, however, support a finding that such conversation constituted notification to Respondent that Gallette was engaged in union activity. Rodorigo acknowledged that during the telephone conversation, Gallette mentioned that the union insurance did not require the $200 copayment. Rodorigo assumed that Gallette brought up the matter of the union insurance because they had previously discussed the subject of whether union insurance required the copayment. At the time of the earlier conversation, Rodorigo suggested that it did because of what he had learned from his brother-in-law. Gallette's description of the conversation in part corroborates the testimony of Rodorigo. In describing his conversation with Rodorigo, Gallette testified: "And I told Mr. Rodorigo, I said you told us that the union had to pay, you know, pay into their premium and I said I found out that they didn't because I called them." Gallette testified that he told Rodorigo that he had checked with the Union's benefits office to determine whether there was any additional copayment on the union insurance. Gallette did not allege that he told Rodorigo that he had spoken with a union business agent or union organizer. Thus, the overall testimony does not reflect that Gallette communicated anything more to Rodorigo other than his simply checking with the union benefits office to clarify an issue they had discussed in a prior conversation. Admittedly, at the time of the conversation, Gallette had not engaged in any organizational activities and had not even spoken with either Andrews or Sievert.

Accordingly, there is insufficient evidence to show that Rodorigo had any knowledge of Gallette's engaging in union activity prior to the alleged changes imposed on February 11. Gallette's own testimony indicates that he made no mention of his union activity prior to Rodorigo's telling him that he had to relinquish his cellular phone. While Gallette testified that he

produced the union cards before Rodorigo informed him that he would lose the use of the van, I do not find Gallette credible in this regard. Although Gallette asserts that he was told to turn over the keys to the van only after he announced his intent to assist the Union in organizing, he also testified that when he had first arrived at the office on February 11, Cox told him that his van was to be emptied and that Ragland had informed him that he would not need the van as he was a "construction worker." Finding his testimony to be self-serving and contradictory, I do not credit Gallette with respect to the alleged timing of his pronouncement of union activity. Additionally, as discussed above, there is insufficient evidence to demonstrate that Respondent had knowledge of Gallette's union activity prior to his initial assignment to the Sears Roseville job.

Counsel for the General Counsel argues that knowledge of union activities to establish the unlawfulness of adverse actions may also be established through circumstantial evidence such as timing, general union animus, and disparate treatment of the discriminate.[7] There is certainly no question that Gallette contacted Andrews and Sievert just prior to Gallette's reassignment to the Sears Roseville job and the loss of his cellular phone and van privileges. General Counsel also presented Respondent's former employee Tim Pierz who testified concerning a discussion with Rodorigo in October 2003. Pierz testified that while he and Rodorigo were having a couple of beers at Rodorigo's house, Rodorigo asked him if he had ever been in a union. Pierz also testified that in that same conversation and in later conversations, Rodorigo talked with him about his having been a union employer and his disinterest in returning to a union shop. I do not find Pierz' testimony significant in light of Rodorigo's unrebutted testimony that he had been in negotiations with the Operating Engineers Union for the past 8 months.

Having considered the totality of the evidence, I do not find sufficient evidence of Respondent's knowledge prior to the alleged changes of February 11. While it is true that the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of the circumstances must demonstrate more than a "mere suspicion" that Gallette's union activity was a motivating factor in Respondent's February 11 actions.[8] *Cardinal Home Products,* 338 NLRB 1004, 1012 (2003); *Computaprint Corp*., 261 NLRB 1106, 1107 (1982).

As the Board has found, it is axiomatic that an employer could not have been unlawfully motivated if it was unaware of protected activity. See *Tomatek, Inc*., 333 NLRB 1350, 1356 (2001). Accordingly, the General Counsel has failed to demonstrate by direct or circumstantial evidence that Respondent had knowledge of Gallette's union activity prior to Respondent's conduct on February 11, and thus has failed to meet the requisite burden under *Wright Line*. *Boardwalk Regency Corp.*, 344 NLRB 984 fn. 1 (2005); *Stanford Linear Accelerator Center*, 328 NLRB 464 fn. 1 (1999).

2. Whether Respondent unlawfully discharged Gallette

Counsel for the General Counsel argues that by transferring Gallette to an installation job with a 7:30 a.m. start time, and by taking away Gallette's transportation, Respondent caused the termination of Gallette. Counsel further argues that "an employer causes an unlawful constructive discharge when the burdens imposed upon the employee cause, and are intended to cause, a change in working conditions so difficult or unpleasant as to force him to resign." Counsel for the General Counsel submits that while Gallette did not quit in the instant case, the situation is analogous. The instant case, however, is not comparable and is notably distinguishable from circumstances where the Board has found a constructive discharge.

Gallette does not assert that he was forced to resign. While he attributes lack of transportation as a factor, he contends that he decided to take the week of February 14, 2005, as a week of vacation. Although he had already received discipline from Ragland for his failure to report to work on time on February 9, he did not contact Ragland to notify her of his intended absence for the week of February 14. He admits that he simply left a message on Rodorigo's cellular phone. Without hearing back from Rodorigo and without any further attempts to secure authorization from either Rodorigo or Ragland, Gallette failed to report to work on February 14 and 15. It is undisputed that prior to Gallette's visiting Respondent's office at approximately 3 or 4 p.m. on February 15, Gallette had not received authorization for his absences on February 14 and 15.

Gallette testified that when he arrived at the facility on February 15, he told Ragland that he was on vacation. He admits that while she told him that he was not authorized to be on vacation, he contended that he was and simply walked out of her office. Counsel for the General Counsel submits that Gallette failed to show up for work during the week of February 14 because of Respondent's unlawful removal of the company-provided van. Gallette, however, testified that he telephoned Ragland on Friday, February 18, and inquired where he was to report to work the following Monday. Gallette did not assert in his testimony that anything had changed with respect to his limitations in transportation. His silence in that regard and his notification of intent to return to work on Monday, February 21, undercuts the argument that Gallette did not report to work on February 14 because of Respondent's unlawfully imposed burdens.

As discussed above, I do not find that Gallette's union activity was a substantial or motivating factor in Respondent's actions toward Gallette on February 11. With respect to his discharge, however, the overall record supports a finding that

[7] *Montgomery Ward*, 316 NLRB 1248, 1253 (1995).

[8] In her brief, counsel for the General Counsel argues that when Rodorigo called Gallette back to the office on February 11, he made "repeated references to Gallette's 'bad attitude.'" While the Board has noted that in certain circumstances an employer's reference to an employee's "bad attitude" may be a veiled reference to the employee's protected activity, the overall evidence in this case does not support such a finding. Admittedly, Rodorigo's alleged reference to Gallette about his attitude occurred after Gallette's proclamation to Ragland: "I'm going home, forget—you tell him to call me I'm on my way home to Monroe right now, and when you get all of this straight and everything, have him call me." Even after Gallette agreed to return to work, he did not do so. His explanation to Rodorigo for not doing so was his having breakfast. It is reasonable that inasmuch as it was within this context of admittedly defiant behavior, Rodorigo's reference to Gallette's "bad attitude" appears to be directed at Gallette's specific actions and not a veiled reference to any suspected protected activity.

General Counsel has sustained the requisite burden under *Wright Line*. Admittedly, Respondent was aware of Gallette's union activity as of the date of his discharge. He not only informed Rodorigo of his intent to assist the Union in organizing Respondent's employees, he also produced the union authorization cards that he planned to distribute. Additionally, Andrews' letter of February 14 was delivered to Respondent on February 15 and identified Gallette as engaged in union activity. Thus, Respondent's knowledge of Gallette's union activity is clearly established prior to his discharge. Inasmuch as I have also credited Gallette in regard to the February 11 alleged 8(a)(1) threat, there is also a sufficient showing of animus that supports the inference that protected conduct was a motivating factor in Respondent's decision to terminate Gallette. It is reasonable that because of Gallette's proclaimed union activity, Respondent welcomed the opportunity to terminate Gallette.

Once unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. 251 NLRB at 1089. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. *Five Cap, Inc.*, 331 NLRB 1165 (2000); *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

Upon my initial analysis, it appeared that Respondent had met its burden under *Wright Line*, demonstrating that despite any apparent motivation, it would have terminated Gallette even in the absence of any known union activity. Even before the articulation of the *Wright Line* analysis, the Board has recognized that if an employee provides an employer with sufficient cause for discharge for which the employee would have been terminated in any event, the discharge cannot be held as unlawful merely because the offender was an active union supporter. See *Americas Restaurant & Hotel*, 221 NLRB 1260, 1269 (1975); *Kate Holt Co.*, 161 NLRB 1606, 1612 (1966).

Despite Gallette's known union activity, Gallette did not report to work as scheduled on February 14. While he asserted that he was absent because he took a week of vacation, there is no dispute that he did not obtain prior authorization for doing so. Admittedly, when Ragland told him that he was not authorized for vacation on February 15, he argued with her and walked out of the office. Even if his earlier absence for the week had not triggered termination, his insubordinate behavior on February 15 could arguably have resulted in discipline.

Counsel for the General Counsel argues that Rodorigo had previously authorized Gallette to take a week's vacation at his discretion because Gallette was entitled to the week and work was slow. While Gallette testified concerning two prior occasions when he took vacation with less than 2 week's notice, his testimony reflects, however, that he did so after receiving authorization from either Ragland or Rodorigo. There is no evidence that Gallette or any other employee has been permitted to take vacation without any prior authorization.

Thus, upon first blush, it appears that Gallette's scheduling himself for vacation without prior authorization would result in discipline even in the absence of protected activity. The total record evidence, however, does not demonstrate that Gallette would have been terminated in the absence of his protected activity. Ragland testified that after the attendance meeting on February 7, she had disciplined employees for their attendance infractions. Ragland also testified that while she had terminated Gallette for his failure to report to work, she had also terminated employees John Koss and Terry Rodorigo for their failure to call in or to show up for work for 2 days. Ragland clarified for the record that the "Terry Rodorigo" terminated by Respondent was Ron Rodorigo's brother who had worked as a general laborer or helper. This individual is distinguished from Terri Lynn Rodorigo who is currently employed as an office assistant and who testified in this proceeding. Respondent introduced into evidence a November 2003 time record documenting that Koss failed to show for work on November 11 and 12, 2003. Counsel for the General Counsel submitted into evidence a copy of the May 10, 2005 termination notice issued to employee Terry Rodorigo for his failure to call in or to show up for work on May 9 and 10, 2005. Respondent's records also indicate that Terry Rodorigo was also documented as failing to call or to show for work on December 9, 2004, and on February 16, 2005. Respondent submitted into evidence a warning that was issued to Terry Rodorigo on February 16 for his failure to call in or to report to work. No evidence was submitted to show that Respondent issued any discipline to Terry Rodorigo for his "no-call/no-show" in December 2004. While Terry Rodorigo called in on March 23, 2005 to say that he would be in later, he never showed up. Ragland further admitted that while Terry Rodorigo was documented as late on February 24, March 15, 28, and 29, April 1, 4, 12, 19, 20, 21, 25, 26, 28, and 29, and May 4 and 5, he received no discipline. It was only after complaint issued in this case on April 22, 2005, that Terry Rodorigo was terminated for his documented "no-call/no-shows."

Evidence submitted by counsel for the General Counsel also reflects that while service technician Richard Rhodes was late on 12 occasions between February 11 and May 4, he received no discipline. Respondent's records also indicate that installer Dean Rodorigo was late on four occasions between February 17 and May 10, and received no discipline. While service technician Joe Lambert was late March 7, 10, 11, and 14, there is no record of any discipline imposed other than a warning issued on March 14, for Lambert's tardiness as well as his failure to follow instructions and lack of cooperation/teamwork. While employee Ken Devanzo was documented as late on February 9, 15, and 17, and March 1, 2, and 3, he received no discipline. Respondent's records also reflect that employee Keith Dochenetz was late three times in March and April and yet received no discipline. Accordingly, while Ragland asserts that after February 7, she disciplined employees if they were consecutively late without a valid excuse, Respondent's records do not support her contention. In his brief, counsel for Respondent argues that there is no evidence that any other person who was 2-day no-call/no-show was not terminated. While Terry Rodorigo was terminated in May 2005 for a 2-day no-call/no-show, the termination followed a lengthy series of tardiness and attendance infractions between February 7 and May 10. Al-

though Respondent asserted that Gallette had prior attendance infractions, Respondent offered no evidence of discipline other than the warning issued for his tardiness on February 9. Additionally, Respondent offered no evidence of Gallette's attendance infractions prior to February 9. Accordingly, Respondent's records demonstrate that attendance infractions by other employees have been tolerated both before and after February 7. Respondent has not met its burden in showing that Gallette would have been terminated in the absence of his protected activity. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) in its February 15, 2005 discharge of Russell Gallette.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by threatening an employee with adverse employment consequences if he engaged in activity on behalf of the Union.
4. Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Russell Gallette on February 15.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent did not violate the Act in any other manner as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily discharged employee Russell Gallette, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest, as computed in *New Horizon for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]